Military Whistleblower Protection Act

Whistleblower Investigations

Title 10, United States Code, Section 1034

Enabling Learning Objectives

ELO

Whistleblower Investigations

1. Describe the four categories of Whistleblower complainants
2. Describe the agency authorized to receive Whistleblower allegations
3. Identify what agency is responsible for investigating reprisal allegations for each complainant category
4. Describe the four questions (or factors) that establish the framework for an investigation into an allegation of Whistleblower Reprisal (WBR)

WBR Standards / References

Whistleblower Investigations

- **Military: 10 USC 1034, DoD Directive 7050.06, and IGDG 7050.6**
- **IGDG 7050.6**
- NAF: 10 USC 1587 and DoD Directive 1401.03
- Contractor Employees: 10 USC 2409, FAR, Subpart 3.9
- **AR 20-1, paragraphs 1-13 and 7-4**
- **AR 600-20**
- **A&I Guide, Part Two, Ch 9**
- **www.dtic.mil/whs/directives**

What is Whistleblower Reprisal?

- The taking (or threatening to take) of an "unfavorable" personnel action or the withholding (or threatening to withhold) a favorable personnel action because the member made or was thought to have made a protected communication.

What does Whistleblower Reprisal mean to the IG?

- **Soldiers have the right to raise matters of fraud, waste, and abuse or other improprieties within the Army without fear of reprisal.**
- **10 USC 1034 states that Members, and former Members, of the Armed Forces shall be free to make a protected communication.**
- **Section 202 of The Notification and Federal Employee Antidiscrimination and Retaliation Act of 2002, the No-FEAR Act, requires that federal employees be notified and trained on their rights and remedies under antidiscrimination and anti-retaliation laws.**
- **Component IGs shall investigate allegations of Whistleblower Reprisal.**

Categories of Employees

ELO 1

Whistleblower Investigations

- **Military Member** Active Duty, Reserve, and National Guard (Federal interest)
- **Non-Appropriated Fund (NAF) Civilian** e.g. AAFES / MWR Employees
- **Appropriated Fund Civilian** General Schedule / NSPS / WG
- **Contractor Employee** e.g. KBR, CACI, BAH, etc.

Military **and** NAF Civilian **Reprisal Complaints**

ELO 2, 3

Whistleblower Investigations

- **Any IG may receive the complaint**
- **DoD IG has oversight of Service reprisal investigations**
- **Military member has the right to appeal directly to the Secretary of Defense**

Appropriated Fund Civilian Reprisal Complaints

Whistleblower Investigations

- **Office of Special Counsel (OSC)**
- **www.osc.gov**
- **U.S. Office of Special Counsel**
  1730 M Street, N.W., Suite 201
  Washington, D.C. 20036-4505
  Tel: (800) 572-2249 or (202) 653-9125

DoD Contractor Reprisal Complaints

Whistleblower Investigations

IG, DoD

Categories of Employees

- **Military Member**

Any IG can receive – IG DoD oversight

- **Non-Appropriated Fund (NAF) Civilian**

Any IG can receive – IG DoD oversight

- **Appropriated Fund Civilian**

Refer to Office of Special Counsel – Assistance

- **Contractor Employee**

Refer to IG DoD - Assistance

Military Whistleblower Protection

Whistleblower Investigations

- **DoDD 7050.06, dated 23 July 2007**
- **No person shall "restrict" a member of the Armed Forces from making lawful communications to a Member of Congress (or their staff) or an IG**
- **Defines "Chain of Command" to include the supervisory and rating chain**
- **No investigation "required" when a member submits a complaint more than 60 days after becoming aware of the personnel action**

NAF Reprisal Protection

- **DoDD 1401.03, dated 23 April 2008**

- **Service IGs authorized to receive NAF Civilian reprisal complaints**

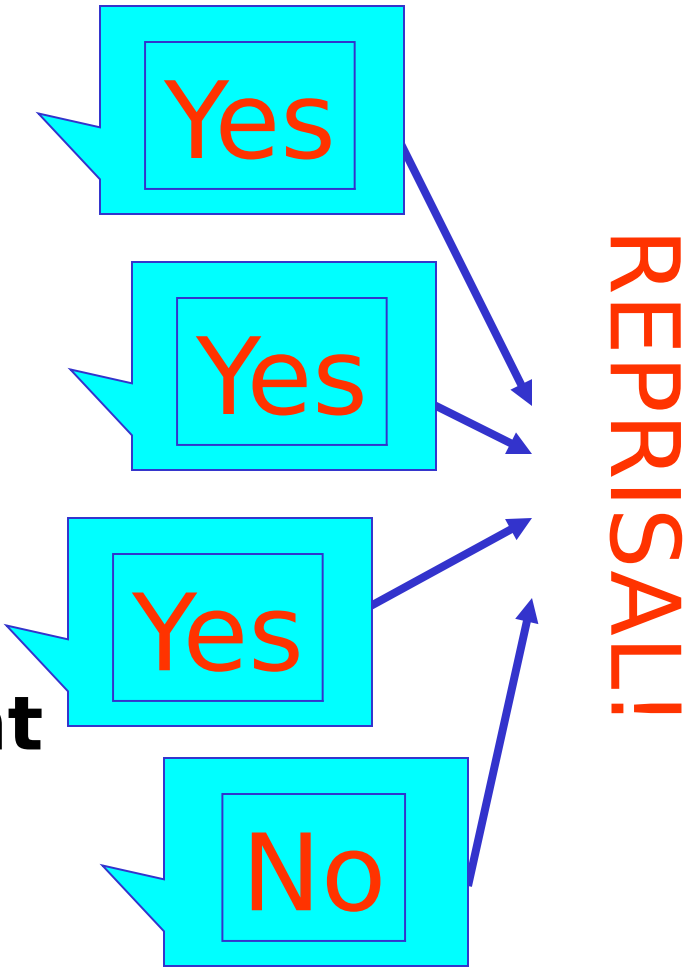
WBR Considerations

- **Timing:**
  - **Complaint must be made within 60 days after the date the member became aware of the personnel action**
  - **Notify DAIG Assistance Division (SAIG-AC) within five working days (DSN 865-1845 or comm. 703-545-1845) IGARS two days**

The Four Questions (short version)

ELO 4

- **Protected communication?**
- **Unfavorable personnel action?**
- **Responsible Management Official (RMO) knowledge?**



Question One:

ELO 4

Did the complainant make or prepare a communication protected by statute?

Protected Communication

Whistleblower Investigations

- **What is a protected communication (PC)?**
- **What was the PC?**
- **To whom was it made?**
- **When was it made?**

PC **T I M E L I N E**

Protected Communication First Category

Any lawful communication to:

- **Members of Congress**
- **Inspectors General**

- ***Regardless of subject***

Protected Communication: Second Category

Lawful communications *made to:*

- **DoD audit, inspection, investigation, or law enforcement organization**
- **Any person or organization in the chain of command; or any other person designated pursuant to regulations or established administrative procedures to receive such communications (e.g. EO, Safety Office, etc.)**

Protected Communication: Second Category (cont'd)

Protected only if the communications concern:

- **Violations of law or regulation (includes EO issues)**
- **Gross mismanagement**
- **Abuse of authority**
- **Gross waste of funds or resources**
- **Substantial danger to public health or safety**

Reasonably believed to be true!

Protected Communication

Whistleblower Investigations

Protected communications may be:

- **Verbal, written, or electronic (telephone, fax, E-mail)**
- **Made by a third party**

Chain of command communications may include:

- ***Complaints made during commander's office hours, request mast, or open-door policy***
- ***Complaints made in public forum (Commander's Call)***

Protected Communication

- ***Timing:*** **Date the communication occurred is critical**
- ***Preparing*** **to complain:**
  - **"I'm going to write my congressman."**
  - **"I'm fixen to see the IG about this!"**
  - **"I'm going to tell the old man about these safety violations the platoon sergeants are ordering us to do."**

Protected Communication

- **Give the benefit of the doubt**
  - **Responsible Management Official's belief that the member intended to make, or may have made, a protected communication. (No actual communication is necessary)**

PERCEPTION = REALITY

Protected Communication?

Whistleblower Investigations

- **CPL Hildan says she was reprised against because she announced at a recent Commander's Call that her supervisor discriminated against her because of her religious beliefs.** Yes

- **CPT Kirk alleges he was reprised against because his mother wrote the DoD Hotline and complained that he was being sent on overseas deployments more than anyone else in his unit.** Yes

- **SPC Shea claims his supervisor reprised against him because he wrote a letter to his Congressman requesting that a National Park be named in honor of Jerry Garcia.** Yes

Question Two:

ELO 4

Was an <u>unfavorable personnel action taken</u>

<u>or threatened,</u>

or was a

<u>favorable personnel action</u>

<u>withheld or threatened to be withheld</u>

<u>following</u> the protected communication?

Unfavorable Personnel Action

- **What is a personnel action (UPA)?**

Any action that affects, or has the potential to affect, a Service Member's position or career.

Unfavorable Personnel Action

- **Performance evaluations**
- **Transfer or reassignment**
- **Changes to duties or responsibilities**
- **Disciplinary or other corrective actions**
- **Denial of reenlistment**
- **Separation proceedings**
- **Decisions concerning awards, promotions, or training**
- **Decisions concerning pay or benefits**
- **Referrals for Mental Health Evaluation (MHE)**

Unfavorable Personnel Action

Unfavorable personnel action (UPA) may include:

- **Actions taken as a result of an investigation (does not include initiation of an investigation)**

- **Revocation of:**
  - **Security clearance**
  - **Authorization to carry weapons**
  - **Flying status**
  - **Personnel Reliability Program certification**

Key: Was the action discretionary?

Unfavorable Personnel Action?

Whistleblower Investigations

- **1LT Newkirk claims that although his annual performance report had all top-level ratings, the narrative portion did not contain the key "hard- charging" words he feels are needed to remain competitive for future promotion.**

Maybe

- **SSG Schultz was to attend the Senior Enlisted Academy enroute to his next assignment but was placed on administrative hold pending the outcome of a CID investigation. His NCO Academy slot was subsequently canceled even though the investigation cleared him of all charges.**

Probably Not

A Case Study

Board for Correction of Military Records (BCMR)

- **5.3.4.1. Consider applications for the correction of military records at the request of a member or, otherwise, who alleged that the prohibitions of paragraphs 4.2. and 4.4. have been violated.**

- **5.3.4.2.4. If the BCMR determines that a personnel action was in reprisal under this Directive and section 1034 of Reference (b), it may recommend to the Secretary of Military Department concerned that disciplinary action be taken against the individual(s) responsible for such personnel action.**

Unfavorable Personnel Action

- **What if…**
  - **Responsible management official did not consider the personnel action to be “adverse”?**
  - **Personnel action was subsequently reversed?**
  - **Member left the service before the personnel action could have an effect?**

Declination

- **DoD IG declines a Whistleblower Reprisal case when:**
  - **"No" to Questions One and / or Two**
    - **No Protected Communication**
    - **No Unfavorable Personnel Action , or**
  - **Untimely**
- **Declination**
  - **Only DoD IG can decline a case**
  - **Command / local IG must report all reprisal allegations within two working days to DoD IG and SAIG-AC, even if it doesn't meet the rules above**
  - **The option for command / local IGs to recommend declination was revoked to streamline the process per a Memorandum of Agreement between DAIG and DoD IG**

ELO 4

Question Three:

Did management officials <u>responsible</u> for taking, withholding, or threatening the unfavorable personnel action <u>know about</u> the protected communication <u>before</u> they took the unfavorable personnel action?

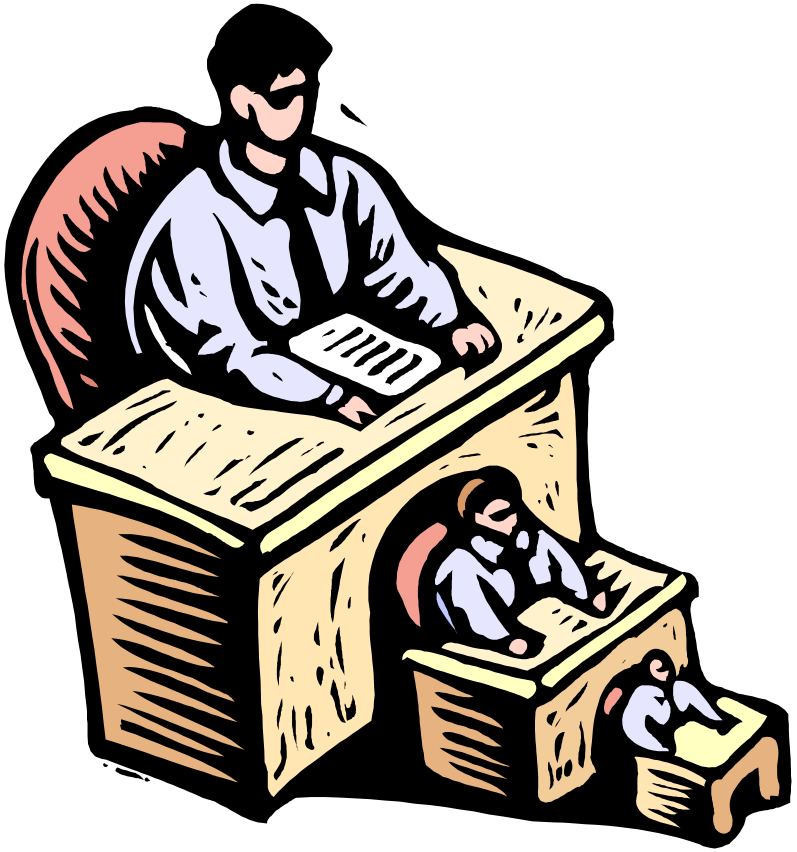
Responsible Management Official Knowledge

Two-step process:

- **Identify the responsible management officials (RMO)**
  - ***All officials for each personnel action***

- **Determine if responsible management officials knew of the protected communication**
  - ***When did RMOs know?***
  - ***What did RMOs know?***
  - ***How did RMOs find out?***
  - ***Did anyone else know the RMOs knew?***

Who is a Responsible Management Official?



Anyone who:

- **Influenced or recommended the action be taken**
- **Made the decision to take the action**
- **Signed applicable correspondence regarding the action**
- **Approved, reviewed, or endorsed the action**

Responsible Management Official Knowledge

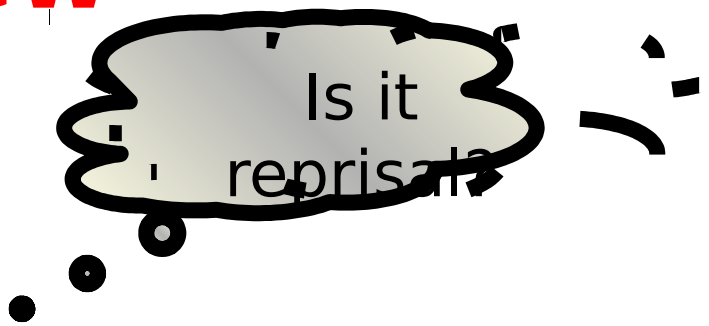
- ***Timing:***

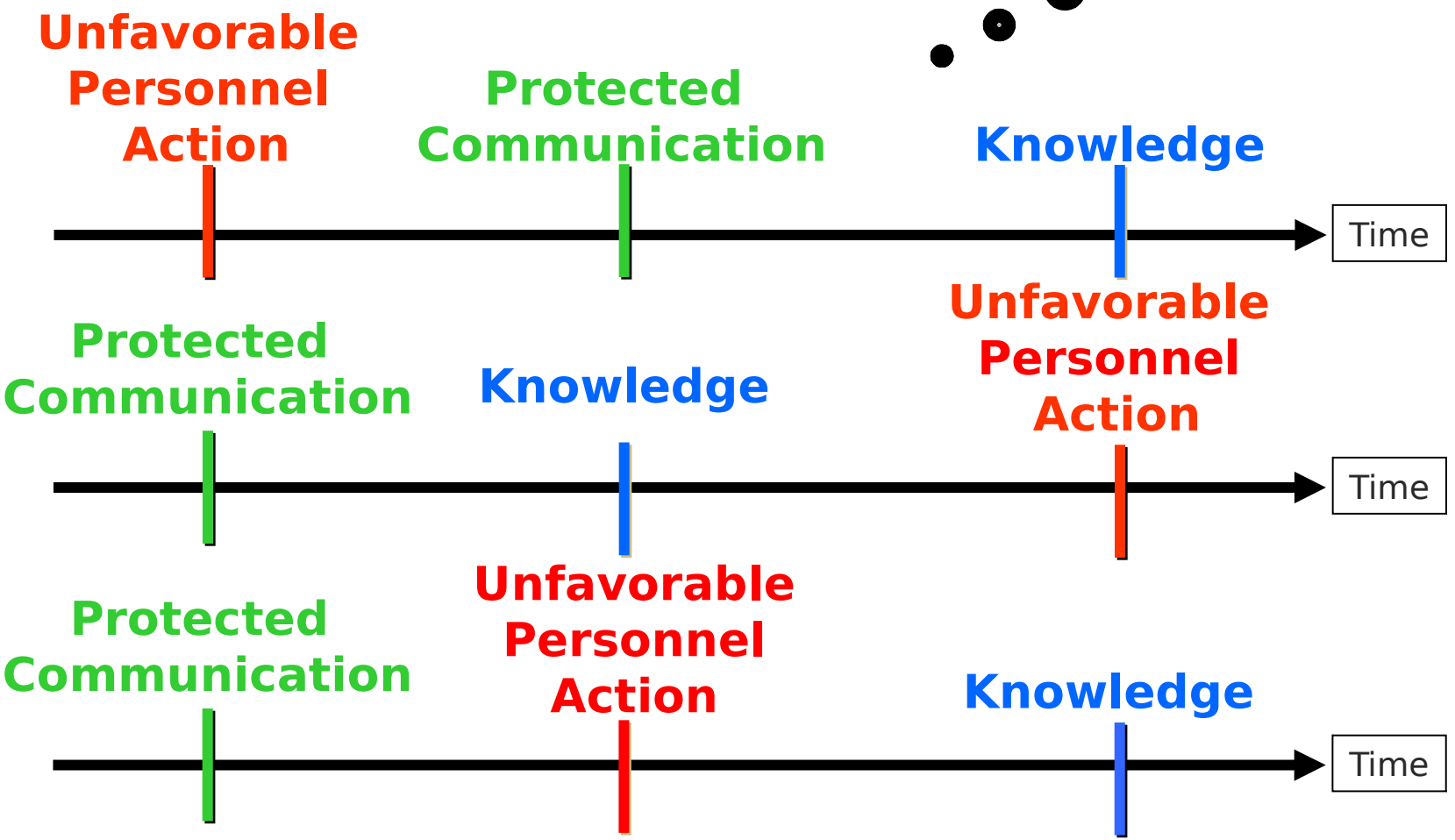
✓ **Determine exact date responsible management officials:**

- **First considered taking the action**
- **Initiated the action (began drafting)**
- **Completed the action**
- **First notified the complainant of the action (being considered, in progress, or delivered)**

✓ **Establish the timing for <u>each</u> personnel action**

Let's Review
(timing)





Responsible Management Official Knowledge

Knowledge includes:

- **Personally receiving the protected communication**
- **Hearing rumors about the protected communication**
- **Suspicion or belief that the complainant may have made a protected communication**
- **Notes:**
  - **Precise knowledge of the protected communication is not necessary**
  - **Simply being aware that a protected communication occurred (regardless of the subject or content) is sufficient**

Responsible Management Official Knowledge

- ***Ask the complainant:***
- **"Who do you believe is responsible?"**
- **"Why do you believe the responsible management official knew you made a protected communication before taking the unfavorable action?"**
- **"Who can testify or provide documents to support your allegation that the responsible officials knew of your protected communication?"**

Responsible Management Official Knowledge

- ***Ask each responsible management official:***
- **"When and how did you first become aware of the complainant's protected communications?"**
- **"When and how did you first come to believe or suspect that the complainant may have made (or intended to make) a protected communication?"**

Responsible Management Official Knowledge

What if…

- **Responsible management officials deny having any knowledge of the protected communications?**
- **No documentary evidence or corroborating witness testimony exists that the responsible management officials knew of the protected communications?**

Responsible Management Official Knowledge

If there is any doubt or uncertainty

whether the responsible management officials knew about the protected communication --

give the complainant the benefit of the doubt and proceed.

uestion Four:

tions

Does a <u>preponderance of credible</u>

<u>evidence</u> establish that

the unfavorable personnel action

would have been taken absent

Independent Basis for Personnel Action

- **Documentary evidence**
  - Copy of the unfavorable personnel action
  - Service regulations and policies
  - Other relevant documents
- **Testimonial evidence**
  - Complainant
  - Responsible management officials (RMO)
    - Anyone who decided, directed, recommended, or influenced the unfavorable personnel action
  - Other key witnesses

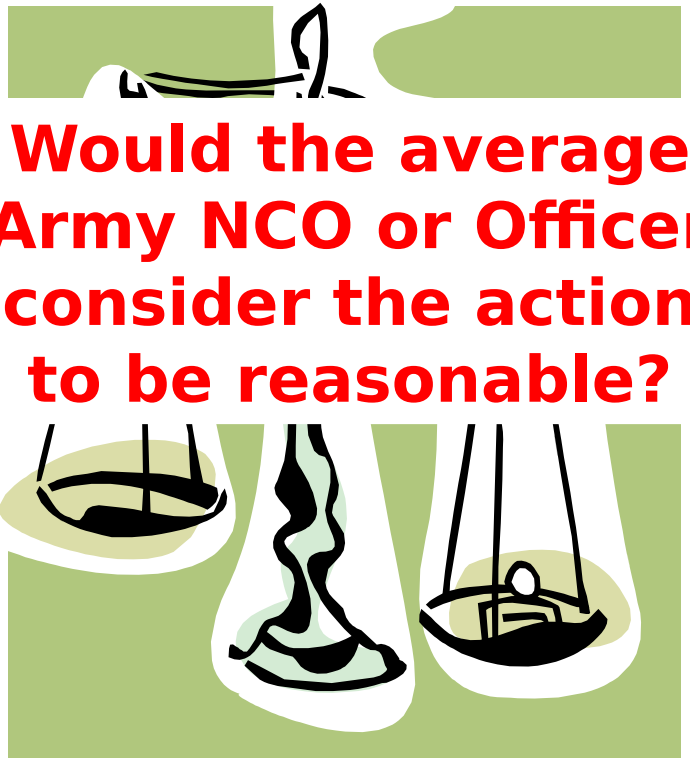
Independent Basis for Personnel Action

- **What was the effect of the protected communication on the responsible management official?**
- **What factors did the responsible management official consider in taking the action?**
- **Why did the action occur when it did?**
- **Was the action consistent with previous actions?**
- **Who can corroborate the responsible**

Independent Basis for Personnel Action

The five elements of proof for Question 4!

- **For each UPA Consider:**
  - **Reasons**
  - **Procedural correctness**
  - **Consistency with past pra**
  - **Motive**
  - **Reasonableness**

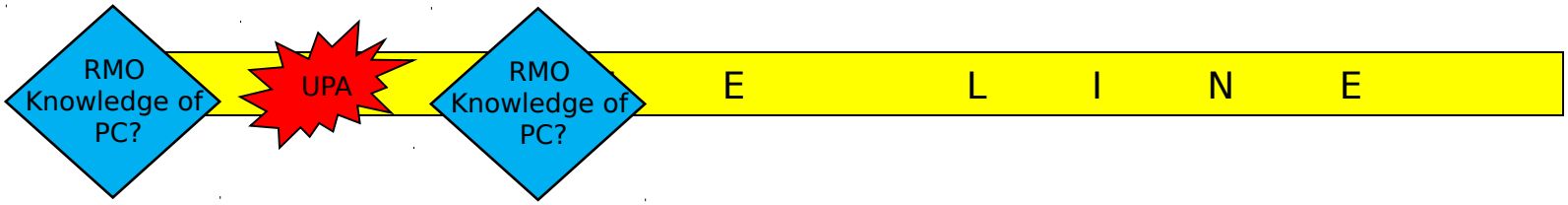


Complainant Interview Guidelines

- **Interview complainant first**
- **Verify relevance of documents submitted**
- **Ask what the complainant believes were the responsible management official's motives to reprise**
- **Develop new witnesses**
- **Character witnesses**
  - **Relevant to the reprisal?**

Responsible Management Official Interview Guidelines

- **Interview all RMOs**
  - **Anyone who decided, directed, recommended, or influenced**
  - **Anyone who signed a document**
- **Establish what events preceded the action**
- **Did the RMO know of the PC and when did the RMO know it?**



RMO Status: Suspect vs. Subject

- **RMOs WILL BE INTERVIEWED AS SUSPECTS**
  - A violation of 10 USC 1034 is a violation of a lawful general order under Article 92 of the UCMJ

- **Military case law has established that an individual must be read his / her Article 31 rights (DA Form 3881) if a person asking the questions is trying to elicit an incriminating response.**

IG Records for Adverse Action

- **Per AR 20-1 (7-4b(3)), IG Records can be used as the basis for adverse action against individuals, military or civilian, by directing authorities or commanders if they contain a substantiated allegation of Whistleblower reprisal.**

- **National Guard falls under State Code of Military Justice unless "Title 10 Status"**

Analyze Evidence and Conclusions

TANDARD: Preponderance of credible evidenc

- **Evaluate documents and testimony**
  - **What's credible, what's not, and why**
- **Resolve any conflicts**

Submission to DoD IG

- **Chapter 9, Part Two, <u>The A&I Guide</u>:**
  - **Advisement**
  - **Declination**
  - **ROII / ROI (example)**
  - **Your Directing Authority = Concur / Non-concur**
  - **Final Approval = DoD IG**

Questions?

Categories of Employees

ELO 2

- **Military Member** Active Duty, Reserve, and National Guard (Federal interest)
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  e.g. AAFES / MWR Employees
- **Appropriated Fund Civilian** General Schedule / NSPS / WG
- **Contractor Employee** e.g. KBR, CACI, BAH, etc.

Categories of Employees

ELO 3

- **Military Member**

  Any IG can receive – IG DoD oversight

- **Non-Appropriated Fund (NAF) Civilian**

  Any IG can receive – IG DoD oversight

- **Appropriated Fund Civilian**

  Refer to Office of Special Counsel – Assistance

- **Contractor Employee**

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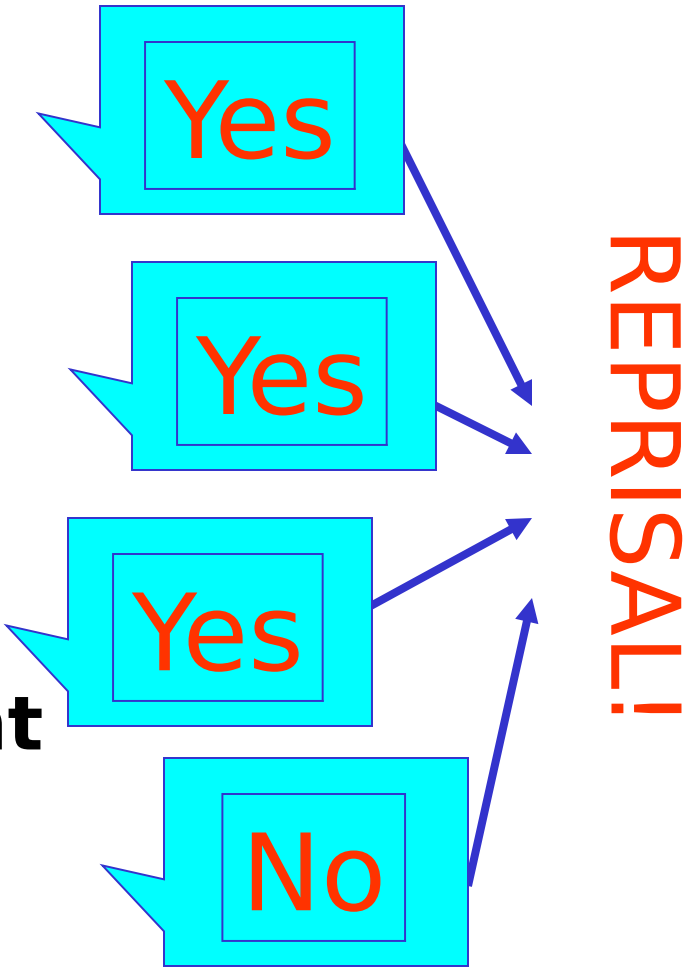

Let's Review
(timing)